85-1438

No.

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLOTTE MEMORIAL HOSPITAL AND
MEDICAL CENTER, ET AL,

Petitioners,

v.

WILMA OLIPHANT, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TOPP

QUESTION PRESENTED FOR REVIEW

When, in a suit under 42 U.S.C. §2000e-2, it is asserted on behalf of a "class" of black persons that, throughout a period of years, they had been individually discharged from the defendants' employment "because of" their race and therefore in violation of law - and when the defendants, at the direction of the trial Court, delivered to the plaintiffs and their attorneys written records regularly maintained by the defendants in the course of business, setting forth the names of each of such discharged persons and the cause and reason for each of such discharges - and when the plaintiffs, making no effort to attack or refute such stated and recorded reasons and causes, relied instead upon statistical

disproportion or "imbalance" in the percentage of black employees discharged as compared to the percentage of white employees discharged - and the trial Court, in such situation, having nevertheless ruled that, in view of the aforesaid "imbalance," each and all of the black persons discharged are to be presumed to have been discharged "because of" their race - is not such ruling plainly erroneous in view of the reiterated holdings of this Court as to what are the essential subjects of proof and the proper sequences of proof and of shifts in the burdens of proof in litigation under this Statute?

LISTING OF ALL PARTIES IN THE CASE

The plaintiffs in this case are Wilma Oliphant, Terry Ragin, Bernice Howie, Bertha Anderson and Ruth Coleman,

"individually and on behalf of all others similarly situated."

The defendants in the case, now Petitioners to this Court, are Charlotte Memorial Hospital and Medical Center, and Charlotte-Mecklenburg Hospital Authority.

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OPINIONS OF THE COURTS BELOW

The opinion and the rulings of the United States District Court for the Western District of North Carolina are interspersed throughout numerous orders and memoranda and statements of findings and conclusions in this case and are not published. The pertinent portions thereof are, however, summarized in the Opinion of the United States Court of Appeals for the Fourth Circuit - and that Opinion, though likewise unpublished, is reproduced in an Appendix which is attached to this Petition.

JURISDICTION OF THIS COURT

The Opinion of the Court of Appeals, embodying its decision and judgment is dated October 10, 1985, and was entered on that date.

Thereafter, within apt time, the Petitioners filed with the Court of Appeals a Petition for Rehearing, which was denied on November 29, 1985. The filing of this Petition for Certiorari is within ninety days from the date of the denial of rehearing.

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

"It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2

STATEMENT OF THE CASE

The Petitioners believe that everything pertinent to a statement of the

case is elsewhere set forth in this Petition - in the "Question Presented For Review" and in the "Reasons For The Granting Of A Writ Of Certiorari" - and that in the interest of brevity, it would seem not needful to repeat the same at this point.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

The defendants have approximately 3500 employees. The black persons who have been individually discharged from time to time during the approximately ten year period covered by this case - and who are declared to be within the "class" hereinabove referred to and represented by the named plaintiffs - are probably 600 to 700 in number.

What are the standards and principles

of proof properly applicable to the cases of these hundreds of former employees? Such standards and principles have, of course, been painstakingly developed and enunciated by this Court in Texas Department v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981) and its antecedent and related caes, such as McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct, 1817 (1973), Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977), Furnco Construction Corp. v. Waters, 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978).

The decision of this Court in Burdine is very clear and precise on these matters.

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for the employee's rejection'. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination."

Texas Department v. Burdine, 450 U.S. 248, 252-253, 67 L.Ed.2d 207, 215 (1981)

"The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

Idem, 450 U.S. 253, 67 L.Ed.2d 215

"The Court of Appeals has misconstrued the nature of the burden that McDonnell Douglas and its progeny place on the defendant . . . We stated in Sweeney that the employer's burden is satisfied if he simply 'explains what he has done' or produc[es] evidence of legitimate non-discriminatory reasons.' "

Idem, 450 U.S. 256, 67 L.Ed.2d 217

It goes without saying that the Courts

below would not consciously disregard these precepts, which have been so clearly and firmly laid down by this Court. Nevertheless, it is readily demonstrable that in the present case, both of the lower Courts have in crucial respects failed to observe and implement these principles.

The Court of Appeals raised "question" as to the District Court's ready adoption of the concept that imbalance between the rate of discharge among the defendants' black employees as compared to the rate of discharge among the defendants' white employees can, in and of itself, be sufficient ground to support a prima facie case of unlawful discrimination by the defendants against their black employees under 42 U.S.C. §2000e-2.

The defendants would agree with the Court of Appeals' expressed doubt on that, but the defendants cannot deny that current decisional trends may furnish ground for the appellate court's proceeding to affirm the District Court on that point. The defendants submit, however, that from that point on, the rulings of both the Courts below erred completely.

Assuming that the statistical disparity above referred to raised a prima facie case against the defendants in behalf of all black employees of the defendants, still Burdine and its related cases establish unequivocally that if, for example in matters of employee discharges, (a) the employer "articulates" or otherwise presents

lawful reasons for employee discharges, and if (b) the discharged employees do not "prove by a preponderance of the evidence" that such declared reasons are pretexts, then the prima facie case, of unlawful action on the part of the employer, dissolves. The crux of the present case is that the defendants did perform "a" - and that the plaintiffs did not even purport to perform "b".

The Court of Appeals says that the defendants "failed to make" any "attempt" to articulate or present reasons or causes for the discharges of employees and that there is no "credible evidence that the cause of the disparity in the termination rates" was anything other than "unlawful discrimination" against black employees (Appendix to this Petition,

pp. 17a, 19a). It is respectfully submitted that there is no evidence whatever in the record to support that statement - and all the evidence is to the contrary.

The state of the record in this case with regard to the defendants having and showing reasons and causes for discharging employees, black and white is as follows. Ella Williams was a paralegal in the employment of the plaintiffs' attorneys. She testified that the defendants "provided" to her "computer printout sheets" and "personnel files" which she "personally" inspected - that the period "covered by these records was "1975 through July of 1979" - that the "information that was set forth" in these records included the employees' "job code numbers" and "names"

and "date of hire" and "a termination column that gave the date of termination" and "a 'reason' column that gave the reason for the termination" and "a column that included race code" (Joint Appendix in the trial Court, pp. 1356-1357).

Ms. Williams further testified that plaintiffs' "Exhibit 4" in the case "shows the terminations in the entire workforce for the years 1975 through 1979" - that "Exhibit 4" was provided to "the plaintiffs by" the defendants and that it lists "reasons for terminations" by "alphabetical identification," and that "they were listed on the computer sheets" by these identifications (Joint Appendix in the trial court, pp. 1360, 1361).

The defendants' Exhibits 5 through 9

list all "Involuntary Terminations" during each of the years 1975 through 1979 - and show the number of "white employees" and the number of "black employees" discharged for each cause listed alphabetically on the same exhibits (Joint Appendix in the trial court, pp. 3611-3615). Such reasons and causes are, in turn, stated and listed alphabetically on the defendants' "termination code" sheet, which is likewise in evidence (Joint Appendix in the trial Court, p. 145).

With such personnel files and computer sheets and termination codes in their hands, the plaintiffs thus have had - since long before the District Court trial - full access to the defendants' records of reasons and explanations for the discharge of each person, black or white, who has

been thus terminated through the years.

Yet the "class" represented by the named plaintiffs have not seen fit to challenge the truth and accuracy of the information and explanations set forth in such records. The great bulk of the 600 to 700 persons in the "class" represented by the plaintiffs apparently choose not to venture on individual contests but to remain instead in the "class" and rely on the presumption, decreed by the Courts below, that each and every person in the "class" has been unlawfully discriminated against by the defendants - for which each and all hope eventually to receive high compensation.

In summary, the situation is as follows:

(1) The decisions of the Courts below

fasten upon the defendants a presumption of liability on the part of the defendants to a "class" of some 600 or 700 employees - as a result of alleged unlawful discharges.

(2) The defendants, availing themselves of the opportunity assured to them by Burdine, have established that they have not unlawfully discharged the members of this "class."

(3) The members of the "class," failing to avail themselves of the opportunity assured to them by Burdine, have not established that the defendants' explanations of such discharges were pretextual.

(4) This state of affairs constitutes a stalemate because the decisions of the Courts below, establishing presumption of unlawful discharges by the defendants of

the members of the "class", remain in effect.

(5) This stalemate can only be broken by this Court's granting review of the case and enforcing upon all parties the principles of Burdine.

Upon all of the foregoing, the defendants pray that the Court grant this Petition for Certiorari.

John O. Pollard
Whiteford S. Blakeney

Attorneys for the Petitioners

Of Counsel:

Blakeney, Alexander & Machen

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1772

Wilma Oliphant; Terry Ragin; Bernice Howie; Bertha Anderson; Ruth Coleman, individually and on behalf of all others similarly situated; Charles Norwood; Lula B. Miller; Evelyn Alexander; Yvonne Sessoms; and Bertha Chisholm; Lilie Ann Stewart; Antwerp Duncan; Mildred Glenn; Charlotte Chapter of the Old North State Medical, Dental and Pharmaceutical Society; and Pamela Bennett; Kim Wallace; Randy Tucker; Roberta Sasportas; Anita Singley;

Appellees,

Versus

Charlotte Memorial Hospital and Medical Center; Charlotte-Mecklenburg Hospital Authority,

Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge (C/A 78-326 & 78-370)

Argued: Aug.10, 1984 Decided: Oct.10, 1985

Before RUSSELL, HALL and CHAPMAN, Circuit Judges.

John O. Pollard, Richard F. Kane (Blakeney, Alexander & Machen on brief) for Appellants; John T. Nockleby (J. LeVonne Chambers, Chambers, Ferguson, Watt, Wallas & Adkins, P.A. on brief) and Michael A. Sheely (Sheely & Gronquist on brief) for Appellees

CHAPMAN, Circuit Judge:

This is an appeal from findings of fact and conclusions of law made by the district court in two employment discrimination suits consolidated for trial. The district court found that the Charlotte Memorial Hospital and Medical Center and the Charlotte-Mecklenburg Hospital Authority (hereinafter "Hospital") had discriminated against black employees and established a class of employees entitled to relief. The court also made findings in favor of individual plaintiffs, intervenors, and

members of the class. The defendants claim error (1) in the manner in which the district court arrived at its findings and conclusions, (2) in its finding that the defendants engaged in classwide racial discrimination, and (3) in its findings as to the individual plaintiffs, intervenors, and class members. We affirm in part and reverse in part.

I

In November 1978 Wilma Oliphant, Terry Ragin, Ruth Coleman, Bertha Anderson, and Bernice Howie brought an action in the United States District Court for the Western District of North Carolina against the Hospital. Each plaintiff claimed that the Hospital terminated her because of her race or because of her opposition to practices made illegal by Title VII. About

six weeks later Charles Norwood, Evelyn Alexander, Yvonne Sessoms, and Lula B. Miller filed an action against the Hospital, alleging that the Hospital took various adverse employment actions against them because of their race. The Oliphant plaintiffs sought to establish a class composed of all blacks employed in clerical positions at the Hospital, and the Norwood plaintiffs sought a class consisting of black applicants for employment as well as black employees of the Hospital. Prior to trial the district court certified a class in the Oliphant case as follows:

> Plaintiffs, all blacks currently employed by defendant Hospital in clerical positions and all blacks employed by defendant at any time since December 6, 1975, in a clerical position who are not currently employed; all of whom have been or

> may have been discriminated against in reference to defendants' policies governing promotion, transfer, job placement, termination, discipline, and unfair job performance evaluations on account of their race.

The district court then consolidated the two actions and certified a class as follows:

> All black applicants for employment or training with and all black employees of defendant Charlotte Memorial Hospital and Medical Center who, at any time since April 24, 1972, have been denied employment or training opportunities, promotions, transfers, equal wages or who have been denied equal performance evaluations, disciplined or discharged in a discriminatory manner because of their race and color or in retaliation because of their efforts to exercise rights under Title VII. This class includes both professionals and non-professionals.

All claims of professionals - physicians, dentists, and nurses - were settled before the trial was concluded.

In its findings of fact and conclusions

of law, the district court modified the class certification and defined the class as follows:

> All black employees of defendants who have worked in or who have sought or have been assigned to non-professional job positions (technical, skilled, semi-skilled and labor) who, at any time since October 13, 1973, have been discriminatorily denied a job, or discriminatorily assigned to a job, or discriminatorily denied transfer to a job, or discriminatorily discharged or subjected to retaliatory treatment or actions, because of race or color.

The Charlotte-Mecklenburg Hospital Authority is a public corporation chartered by the State of North Carolina. The Hospital Authority owns and operates the Charlotte Memorial Hospital and Medical Center, a complex medical service and training facility. During the ten years prior to trial the Hospital employed approximately 3500 persons of whom 38 to 39 percent were

black. There were 450 job codes for employees of the Hospital of which 60 required some type of license, certification or registry. There were approximately 50 divisions or departments in the Hospital ranging in skill from the janitorial to the staff positions. The Hospital director, deputy director, and seven associate directors have been and are now all white. The directors of the medical and dental programs and the director of legal affairs have always been white. No black has ever served as manager of any of the 50 departments, but blacks have held some assistant managerial positions and some supervisory jobs in nursing, pharmacy, environmental services (janitorial), and laundry.

In 1979 eighteen of the fifty

departments had no black employees and about seventy percent of the black employees were in nursing, environmental services, dietary or food handling, laundry and central services. A racial breakdown on these departments in 1975 and 1979 is as follows:

	1975		1979	
	White	Black	White	Black
Nursing	1135	596	1082	495
Environmental Services	33	146	23	174
Dietary	88	226	67	159
Laundry	3	52	5	54
Central Services	16	70	5	50

Black employees were concentrated in the lower paying jobs. Wage differentials between black and white employees with comparable education, length of service, departmental assignment, and work schedules ranged from twenty-nine cents

per hour in 1975 to sixty-four cents per hour in 1978. Supervisory personnel in the majority black departments were mostly white. Black supervisory personnel often were required to work with their crew, while white supervisors only supervised and directed. In environmental services the uniforms of white and black supervisors were different.

In its employment practices the Hospital did not post notices of vacancies until 1978, and at that time the posting was only in the personnel office. By mid 1979 vacancies were posted in the rest of the Hospital on a regular basis. Employees were not advised of upcoming job vacancies even in their own departments. Persons selected by management for promotion or transfer were individually and privately

consulted before the vacancy occurred. In the personnel office lists of vacancies were kept secret from the public and from applicants, and personnel interviewers did not discuss vacancies with applicants until they determined in which vacancy the applicant was interested.

The Hospital's hiring, promotion, and discharge policies were neither complete nor current. As a result, these policies were never available for supervisors to consult. No written criteria was available to personnel officers to guide them in choosing among applicants and employment decisions were based upon primarily subjective opinions and judgments. Supervisors also used subjective judgments in promotional and transfer decisions.

The district court heard this case

in October 1981 and rendered its final findings of fact and conclusions of law in favor of the plaintiffs in June 1983. The Hospital appealed and asserts that the district court erred in three areas: (1) the class certification; (2) the manner in which it developed its findings of fact; and (3) the specific findings of fact as to the individual named plaintiffs.

II

The first issue we must confront concerns the Hospital's contention that the district court incorrectly treated this action as a disparate impact case instead of a disparate treatment case. The Hospital argues that the plaintiffs' evidence failed to meet the requirements of a disparate treatment case on the class claims and thus the district court erred in

finding for the plaintiffs on this issue. We disagree. The differences between disparate impact and disparate treatment cases are clearly explained in EEOC v. Federal Reserve Bank of Richmond, 698 F. 2d 633, 638-39 (4th Cir. 1983), rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank of Richmond, 52 U.S.L.W. 4853 (U.S. June 24, 1984); Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982); and Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 274 n. 10 (4th Cir. 1980). We need not review those differences here. Plaintiffs presented sufficient evidence of disparate impact by the Hospital for the district court to treat it as such.

The Hospital had certain rules and practices that may be viewed as creating

a disparate impact. These rules and practices included:

(1) The existence of a no transfer policy which seems to have been applied to blacks but not to whites[1];

(2) The failure to post vacancies;

(3) The failure to publish job descriptions;

(4) The preselection of white persons by supervisory personnel for vacancies prior to the announcement of the existence of a vacancy; and

(5) The existence of non-job related education requirements.

Although we disagree with the Hospital's claim that the district court

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[1]There was evidence to support a finding that whites were occasionally allowed to transfer laterally but that blacks were not.

incorrectly treated this as a disparate impact case, we must still review the district court's decision concerning the class claims. The determination of the composition of a class is a matter resting within the discretion of the district court. We must affirm the determination of the district court unless the district court has abused its discretion. See Windham v. American Brands, Inc., 539 F.2d 1016, 1070 (4th Cir. 1976).

The district court created five sub-classes:

(1) Those discriminatorily denied a job;

(2) Those discriminatorily assigned to a job;

(3) Those discriminatorily denied transfer to a job;

(4) Those discriminatorily terminated; and

(5) Those discriminatorily subjected to retaliatory treatment or actions.

Of these five subclasses we must reverse the district court's findings as to the first. The first subclass consists of those who were discriminated against in hiring. The district court created the subclass although there is no evidence in the record that the Hospital discriminated against anyone in hiring.

The exhibits show that the Hospital hired a much larger percentage of black employees than the percentage of blacks in the labor force in the Charlotte area. Furthermore, of the named plaintiffs, only Lula Miller made a claim of failure to hire. The district court, however,

found that the evidence was not sufficient to rule on her case. Because the only claimant of discrimination in hiring did not submit sufficient evidence concerning that discrimination, there was insufficient evidence to support the creation of such a subclass.

We also question the district court's finding that a class should be created consisting of those persons discriminatorily terminated. Nevertheless, because of the panel opinion in Lilly v. Harris-Teeter Super Market, 720 F.2d 326 (4th Cir.1983), we are forced to affirm the district court's creation of this subclass. In Lilly we held that a plaintiff in a discrimination case makes out a prima facie case of classwide discrimination in terminations through statistical evidence which

conclusively rules out chance as the cause of a disparity in termination rates. Lilly, 720 F.2d at 336 n. 20. The plaintiffs did so here.

The burden then shifts to the defendant to come forward with a credible, lawful explanation for the disparity. Id. In this action, because it was tried before Lilly was decided, the Hospital simply failed to make this attempt. Instead, the Hospital argues that although plaintiffs' statistical evidence showed that blacks were involuntarily terminated at a rate that exceeded their representation in the work force, the blacks were nevertheless discharged for cause. Accordingly, the Hospital contends that the burden should shift back to the plaintiffs to prove that the terminations were not for cause

or to show that the Hospital otherwise acted in a discriminatory manner in its termination policy. This same point was discussed in the Lilly case. See 720 F.2d at 337 n. 22.

In Lilly this court explained:

> Harris-Teeter advanced no explanation for the disparity between the black and white termination rates, instead arguing that the plaintiffs' statistics "showed only that both blacks and whites had committed dischargeable offenses and had been discharged." That assertion is plainly incorrect, for the standard deviation analysis demonstrates that the significant disparity between the termination rates was not due to chance, but instead to some other cause. That cause is presumed to be unlawful discrimination until the defendant shows otherwise, and Harris-Teeter failed to do so here.

Id. The Hospital had to do more than simply claim that the terminations were for cause. It had to attack the statistical analysis used by plaintiffs or

present evidence from the individuals who fired the employees that each specific employee was fired for cause or otherwise present credible evidence that the cause of the disparity in the termination rates was not due to unlawful discrimination. The Hospital has failed to point to any such evidence in the record. Accordingly, we must affirm the creation of this sub-class.

We have also considered the other sub-classes created by the district court. There is evidence to support the creation of these sub-classes and we cannot say that the district court abused its discretion in doing so.

III

The second issue we must consider concerns the manner in which the district

court developed its findings of fact. The trial of this case began October 21, 1981, and concluded October 30, 1981. On December 2, 1981, the district court filed its Memorandum of Decision and Order of nine pages in which it set forth its findings with reference to patterns and practices of racial discrimination by the defendants and also its findings as to the claims of the named plaintiffs and class members. At the conclusion of this Memorandum of Decision and Order, the district court stated:

> Based upon the above brief findings and conclusions, it is ordered:
> 1. That the parties submit for consideration and approval their settlement of the claims relating to professional employees.
> 2. That the parties meet in the same room and talk seriously and at length about the possibility of a compromise settlement of the claims of each of the persons discussed

above who the court has indicated are entitled to relief.

3. They are directed to report to the court in writing by January 4, 1982, as to the results of their discussion.

4. The court will take whatever action thereafter as is indicated by the report on conversations about settlement.

5. If the settlement does not materialize, the court will:

(a) Instruct the plaintiffs to draw detailed findings of fact and conclusions of law in support of the decisions previously indicated.

(b) Issue an order finally constituting the class.

(c) Require a notice to the class.

(d) Consider a petition for interim fees.

(e) Issue an order respecting stage II proceedings.

The parties were unable to reach a settlement and the plaintiffs' attorney submitted sixty-two pages of proposed findings of fact and conclusions of law. The defendants made general objections to these proposed findings and conclusions,

but did not submit proposed findings and conclusions because of the district court's order which instructed:

> Defendants will be allowed until May 10, 1982, to file not a "pleading" but specific objections and proposals with respect to the documents.
>
> However, whatever is filed must be specific responses to particular sentences of the present drafts, and must be in the form of either a text of a specific change in place of specific language, or a request that particular quoted language or particular described language be deleted. I do not wish to re-edit a series of documents this lengthy at this late date, other than as aided by objections and exceptions drafted as herein described.

The district court did certain editing of the first draft of the proposed findings of fact and conclusions of law and returned it to the plaintiffs' attorney who submitted a new draft containing ninety-seven pages. The district court edited this

submission and, on June 20, 1983, filed its thirty-one pages of findings of fact and conclusions of law. On the first page of this document the district court took note of our decisions in Miller v. Mercy Hospital, Inc., 720 F.2d 356 (4th Cir. 1983); Lilly v. Harris-Teeter Supermarkets, Inc., 720 F.2d 326 (4th Cir. 1983); Cuthbertson v. Biggers Brothers, Inc., 702 F.2d 454 (4th Cir. 1983); EEOC, et al v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983); and Anderson v. City of Bessemer City, North Carolina, 717 F.2d 149 (4th Cir. 1983), rev'd., 53 U.S.L.W. 4314 (U.S. Mar. 19, 1985), in which we criticize the practice of the district court adopting findings of fact and conclusions of law prepared by the attorney for the prevailing party after

the court had announced its decision in general and conclusory terms. In response to these decisions the court observed:

> However, in view of the condemnation in recent cases by the Fourth Circuit Court of Appeals of the use by judges of findings and conclusions prepared by counsel, I have not adopted counsels' work but have, at considerable labor, prepared the following. Because it tries to be faithful to the facts, it smacks heavily of the contents of the original memorandum and of the plaintiffs' offering. It is "an ill favored thing, Sir, but mine own," - and I trust it will be treated as "mine own" by any who read it.

Touchstone, of Ardrey, W. Shakespeare, As You Like It, Act. V, Scene iv, l. 60.

The Supreme Court, however, recently reversed our decision in Anderson, supra. In its decision the Supreme Court discussed the problem of a district court adopting proposed findings of fact and conclusions of law submitted by the prevailing party.

It stated:

> We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. See, e.g., United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 657 (1964); United States v. Marine Bancorporation, 418 U.S. 602, 615, n. 13 (1974). We are also aware of the potential for the overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge will decide in their favor. See J. Wright, The Non Jury Trial - Preparing Findings of Fact, Conclusions of Law and Opinions, Seminars for Newly Appointed United States District Judges, 159,166 (1962). Nevertheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. United States v. Marine Bancorporation, supra, at 615, n. 13; United States v. El Paso Natural Gas Co., supra, at 656-657.
>
> In any event, the district court in this case does not appear to have uncritically accepted findings

> prepared without judicial guidance by the prevailing party. The court itself provided the framework for the proposed findings, when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the district court simply adopt petitioner's proposed findings; the findings it ultimately issued - and particularly the crucial findings regarding petitioner's qualifications, the questioning to which petitioner was subjected, and the bias on the part of the committeemen - vary considerably in organization and content from those submitted by petitioner's counsel. Under these circumstances, we see no reason to doubt that the findings issued by the district court represent the judge's own considered conclusions. There is no reason to subject these findings to more stringent appellate review than is called for by the applicable rules.

53 U.S.L.W. at 4316.

In reviewing the procedure used by the district court, as outlined above, we conclude that his solicitation of findings of fact from the plaintiffs' attorneys, with an opportunity for the defendants' counsel

to object to the plaintiffs' submission and the district court's final editing of the submission passed muster under Anderson, supra.

IV

The Hospital also urges us to reverse the findings of fact concerning the individual plaintiffs. We must review all findings of fact under the provisions of Federal Rules of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

WILMA OLIPHANT

The named plaintiff, a black female, was hired on August 23, 1976, as an audit and cost clerk in the business

office of the Hospital. A high school graduate, she had taken business courses at Central Piedmont Community College, but had not completed the two year course and did not have a certificate from the college. She had worked previously for the North Carolina National Bank as a proof operator. Her job at the Hospital was to handle Medicare and Medicaid vouchers received from the Medicare department and to break them down into the number of days and the amount of money to be paid to the Hospital under these programs. Her immediate supervisor was Hartsell Sweatt.

From August 1976 until October 1976 Oliphant and Sweatt worked side by side at a work table. During this time she claims that Sweatt rubbed his leg against hers. In late October she complained to the head

of the business office about Sweatt's behavior. At this time two white female employees complained of the same actions by Sweatt against them. Wayne Short, the head of the business office, reprimanded Sweatt in November 1977 and Oliphant was moved from the work table to a desk behind a partition where the other employees worked.

As a result of the reprimand Sweatt submitted his resignation, but the two white female employees went to Short and explained that they believed that Sweatt had no wrong intentions in his actions and suggested that the resignation be withdrawn. Oliphant did not participate in the effort to have Sweatt withdraw his resignation. Sweatt later withdrew his resignation.

Oliphant testified that afterwards he

harassed her, finding errors in her work, asking where she was going, asking her to whom she made phone calls, making sure that she was doing her work, and admonishing her not to punch in on the time clock early and to begin work when she arrived. She testified that he did not treat other employees this way. In her testimony, however, there is no indication that she was treated differently because of her race.

The district judge found that from the first interview she was sexually harassed by Sweatt, but the testimony does not support this finding. Furthermore, the district court's conclusion as to the cause of the discharge is totally lacking in support. The district judge found:

> Oliphant's discharge on August 2, 1977, was based on racial discrimination. Defendant's claim that she was discharged for putting the wrong code number on a form is pretextual. She was discharged because of her complaints to management and to EEOC, about Sweatt and about the Hospital's racial practices, and for her request for other jobs in order to avoid contact with Sweatt. Defendant's explanations, including the handling of "anecdotals," are pretextual.

The record clearly shows that no complaint was made to the EEOC until August 11, nine days after Oliphant was discharged. There is no testimony to support a finding that Oliphant made complaints to the Hospital management about Hospital racial practices. In November 1976, shortly after she had reported to Short that Sweatt was rubbing his legs against hers, she asked for a transfer to the health room and was interviewed for this job. She turned the job down because she felt that she could

not type fast enough. In February 1977 she interviewed for another job and again decided that she could not handle it because of her lack of typing skills.

Oliphant and Sweatt worked side by side until Oliphant accused Sweatt of sexual harassment. The evidence shows a continuing deterioration in their working relationship after the allegation was made and after the other female employees withdrew their similar complaints about Sweatt. However, there is nothing in the evidence to support a finding that race was a factor in this clash of personalities. Thus, the district court's finding is clearly erroneous.

TERRY RAGIN

Terry Ragin, a black female, graduated from high school and attended college for

two years. The Hospital hired her in February 1976 as a collection officer in the business department. In April 1976 she complained to her supervisor, Betty Dollinger, and Dollinger's supervisor, Robert Sullivan, that other employees in the collection office were making racist comments about black patients who had not paid their bills. Dollinger testified that she warned the employees about such comments and the comments stopped, but Ragin testified that proper steps were not taken to stop the alleged racist comments.

In September 1976 Ragin argued with a white employee, Joni Jackson. Ragin could not remember who started the argument, but during the argument Jackson called Ragin a "nigger" and Ragin told Jackson that she was going to "kick her motherfucking ass."

Ragin admitted the use of this type of language on a number of occasions.

Although both employees were written up for this incident in an anecdote, the conflict between Jackson and Ragin continued. Betty Dollinger, the supervisor, attempted to reconcile the problem. Ragin testified "I said I'm not kissing her [Dollinger's] behind."

She also told Mrs. Dollinger to go ahead and fire her and they would settle the matter in court. She acknowledged that she had received several warnings because of her conduct and had applied for a transfer, but withdrew the application "because I felt I would stay in the collection department and stick it out. I wasn't going to run."

The collection office worked more than

one shift and Ragin complained to Dollinger that the nightshift was working on account files that she had on her desk and wanted to handle herself. Again she told Dollinger that she would not "kiss her behind" in doing her work. She was written up in an anecdotal for insubordination and being continually uncooperative. This resulted in a meeting of Dollinger and Ragin with Carl Moss, the business office manager. Moss advised Ragin in writing that any further shouting in the office, use of profane and vulgar language, harassment and intimidation of fellow employees or insubordination would result in her termination.

On September 29, 1977, Ragin and Jackson again quarreled, each calling the other "white scum" and "black scum." Ragin

again threatened to kick Jackson's "mother-fucking ass." As a result of these encounters, twenty-two employees of the office signed a petition stating: "The outbursts and threats of Terry Ragin makes [sic] fear and bad working conditions for all members of this office. Action to remove this condition is requested. Ragin was offered a transfer but turned it down because she did not wish to work on week-ends.

On October 9, 1977, Ragin was discharged after a meeting with Robert Sullivan. Sullivan testified and also prepared a memorandum contemporaneous with the event which stated that Ragin had burst into his office and accused him of talking about her with other employees. Three times she stated, "I will hurt you."

Ragin admitted the meeting but denied any threats.

The district court found:

> Terry Ragin was in fact discharged by defendant in retaliation against her refusal to accept her role as a black woman in a white employment society. Her principal crime seems to have been profane and sometimes unsavory conversation. Her conversation, however unpleasant, was in pursuit of a valid right. Her discharge for asserting her rights was more obscene than her language. Ragin is entitled to recover on her claim for discriminatory discharge.

Later the court found:

> Terry Ragin was in fact discharged by the defendant in retaliation against her refusal to accept her role as a black woman in a white employment society. She was discharged for asserting her rights. She is entitled to relief on her claim for discriminatory discharge on October 4, 1977. The reasons set forth in defendant's "documentation" of Ragin's discharge are pretextual rather than valid.

The "documentation" were contemporaneous

memoranda made of various interviews with Terry Ragin and warnings given to her about her conduct. The district court's finding that the memorandum and warnings were pretextual is clearly erroneous. No employer and no group of fellow employees are required to endure the foul language and threats made by this plaintiff. Such a finding by this court does not require a determination of credibility, because Ragin in her testimony admits what she did and this cannot be excused merely as "her refusal to accept her role as a black woman in a white employment society." The record proves that the defendant made every effort to accommodate a very difficult employee and was required finally to separate her to prevent further disruption in the office where she worked.

EVELYN ALEXANDER

Evelyn Alexander, a black female, graduated from high school and attended one year of college. She applied for the data processing technician class when the Hospital hired her in July 1973. She was accepted into the class, but did not get into the orientation class she expected because the employee of the personnel office who was supposed to call her about the class was away from the office because of a death in her family. Although she missed the data processing technician class she was employed as an accounts receivable clerk and did well in this position until she developed problems of absenteeism and tardiness.

The trial judge found that she was denied the data processing technician job

because of her race, was denied a laterial transfer to a vacant job as refund clerk because of her race, and further found:

> Alexander was discharged on April 3, 1978, allegedly because of excessive absences and because she left the Hospital premises on March 31, 1978, and allegedly took more than an hour at lunch without previous permission. There is a background to this. Alexander had filed a charge with the Equal Employment Opportunity Commission on April 21, 1976, alleging that she was denied the refund clerk job (discussed above) because of her race. Twenty days later, the defendant started papering her file with "anecdotals" charging her with absenteeism without determining whether her absences were justified. In fact, the evidence shows that her various absences were justified. The evidence is in conflict on whether plaintiff's absence on March 31 was within the regulations respecting lunch absences; there was no written policy covering the subject. The practice, the rule, whatever it is, was not consistently enforced; employees do leave the Hospital premises at lunch time without obtaining permission and without punching the clock. Employees are at times allowed to combine lunch break with morning and afternoon coffee breaks. The particular absence which brought about plaintiff's downfall was a visit to her insurance agent; her home had been burned a day

> or two previously. Finally, the evidence shows, in fact, that Alexander was gone less than an hour instead of more than an hour. Defendant's offered explanations are prtextual.

Although there is a conflict in the testimony as to how long Alexander was away from the Hospital on March 31, 1978, the district court's findings that the offered explanations were pretextual is clearly erroneous on the record. Mrs. Alexander testified that she went to the insurance agent's office to pay the premium on a policy. The visit did not arise out of the fire which did not occur a day or two before the visit on March 31, 1978, but had occurred in February 1978.

Mrs. Alexander's problems with absenteeism and tardiness began before she filed a claim with the EEOC. In 1975 she missed 202.21 hours, in 1976 she missed

227.5 hours, in 1977 she missed 405.8 hours and until her discharge in April 1978 she had missed 128.1 hours during that calendar year. Her lack of concern for her attendance is clearly indicated in her testimony:

> Q. Back to this conversation with Mr. Moss in what you believe was February or March of 1978, did you assure Mr. Moss that you didn't see any reason that you could not be present at all times from that date forward?
>
> A. I wouldn't tell anybody that.
>
> Q. Did you assure him that you would do your very best to improve your attendance?
>
> A. I'm not sure if I told him that or not.
>
> Q. It's possible you told him that.
>
> A. I doubt it.
>
> Q. So you didn't think your attendance was going to improve at that point.
>
> A. Well, I'm not going to ever put

myself in a situation where I would have to live up to such standards.

Q. I see. You wanted to reserve the option to be late and absent if you felt it was necessary.

A. Not necessarily, but I'm not going to put myself in jeopardy by saying so.

Q. So you could not offer Mr. Moss any guarantee or assurance that things would get better from that point forward.

A. I wouldn't give anybody that guarantee.

Q. And you did not offer any possible solutions to your attendance and tardiness problem; is that right?

A. Did I offer?

Q. Yes, ma'am. Did you offer any possible solution?

A. Such as what?

Q. Such as medical leave of absence, which we've already discussed, anything else like that that you might have suggested that you do?

A. No.

Q. You made no suggestions whatsoever?

A. No.

Beginning in 1975 her supervisors counseled with her about absenteeism and tardiness. They advised her that she was doing a good job but her job required that she be present. The continued absenteeism produced written warnings on March 3, 1977, June 10, 1977, and November 21, 1977. At a meeting in February 1978 with her supervisor and the general manager of the office she agreed to try to be at work every day, but her record of absenteeism continued and at the time of her discharge it was averaging twenty-six percent. These undisputed facts cannot be swept away as pretextual, without evidence to explain or contradict them.

Bertha Anderson, Bertha Chisolm, Ruth Coleman, Lillie Ann Stewart

McCain, Pamela Bennett, Kim Wallace, Lula Miller, and Randy Turner

We have also considered the district court's other factual findings in light of the evidence in the record. Given our standard of review under Rule 52 of the Federal Rules of Civil Procedure, see Anderson, 53 U.S.L.W. at 4317, we cannot say the district court's findings are clearly erroneous.

V

In summary, we reverse the district court's creation of a subclass of those persons discriminated against in hiring and the district court's factual findings concerning three named plaintiffs: Wilma Oliphant, Terry Ragin, and Evelyn Alexander. The decision of the district court in all other respects is affirmed.